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Constitutional Law - Right to Appointed Counsel - Indigent Misdemeanant

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the courts will go in their implication of warranties. For instance, how long does the vendor remain liable? The purchaser of a home often considers it a lifetime investment. Is he entitled to a lifetime guarantee?[29]

While the Pennsylvania Supreme Court has decided that a house must also be a home, builders will want more certainty than this decision leaves them.

John A. Knorr

CONSTITUTIONAL LAW—RIGHT TO APPOINTED COUNSEL—INDIGENT MISDEMEANANT—The United States Supreme Court has held that absent a knowing and intelligent waiver, no person can suffer a "loss of liberty" regardless of the categorization of the criminal offense or the maximum imposable punishment unless he has been represented by counsel at his trial.

Argersinger v. Hamlin, 407 U.S. 25 (1972).

John Richard Argersinger, an indigent, was convicted of carrying a concealed weapon, an offense which could be punished by a maximum of six months imprisonment, a fine of $1000, or both. In a trial before a judge he was convicted and sentenced to serve 90 days. Petitioner instituted a habeas corpus proceeding in the Supreme Court of Florida contending that he was unrepresented by counsel and as a layman, he was incapable of establishing adequate defenses to the charge.[1] The court denied the writ holding that, at most, the right to appointed counsel in a state criminal prosecution is no more extensive than the corresponding right to a jury trial.[2] Since petitioner would not have been entitled to a trial by jury because the maximum punishment was less than six months, fourteenth amendment due process did not require the appointment of counsel in his behalf.[3] The court recognized that there would inevitably be an expansion of the right to appointed counsel beyond the "felony standard" annunciated in *Gideon*

29. In one case, the court held the vendor liable to a second owner for faulty construction nine years after the home was completed. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

1. Agersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970).
2. *Id.* at 443.
3. *Id.* at 444.

v. Wainwright.[4] Instead of adjudicating the merits of petitioner's claims, the court attempted to determine to what extent the United States Supreme Court would subsequently expand the right to appointed counsel and whether petitioner's penalty would have come within the scope of that standard.[5] The court was influenced by the denial of certiorari in misdemeanor cases by the Supreme Court as indicative of that Court's reluctance to extend the right to appointed counsel in such cases even though substantial terms of imprisonment were involved.[6] In effect the court declared that this fundamental guarantee of the sixth amendment is required to insure a fair proceeding only when the accused faces imprisonment of more than 180 days.[7] The court felt that felonies and misdemeanors have similar punitive aspects, namely fine and imprisonment, yet only in regard to the former does the accused suffer a forfeiture of civil rights, (such as the right to vote and to hold public office) and experience difficulties in obtaining subsequent employment.[8] Although the Fifth Circuit had adopted a "loss of liberty" standard for the appointment of counsel,[9] the state court concluded that only the indigent misdemeanant who is deprived of his liberty for more than six months will be subject to the foregoing criminal, civil and social sanctions to a degree which warrants the application of the safeguards of the sixth amendment.[10]

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4. 372 U.S. 335 (1963). In *Gideon,* the petitioner had been convicted of breaking and entering a poolroom with the intent to commit a misdemeanor, a felony under Florida law. The Supreme Court reversed the conviction holding that all indigents accused of felonies will henceforth be entitled to the assistance of counsel in state criminal prosecutions to insure that their convictions are in accord with due process of law.

5. 236 So. 2d at 443.

6. Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied,* 385 U.S. 907 (1966). Petitioner was convicted of a misdemeanor, sentenced to 30 days and fined $254. The latter penalty was subsequently converted to an additional 254 days when petitioner failed to pay the fine. The decision of the Supreme Court of Arkansas was in conflict with the understanding of the right to counsel of the Court of Appeals for the Fifth Circuit, which rejected the distinction between felonies and misdemeanors. *See* McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); DeJoseph v. Connecticut, 3 Conn. Cir. 624, 222 A.2d 752 *cert. denied,* 385 U.S. 982 (1966). Petitioner was found guilty of non-support and sentenced to a year's imprisonment without the assistance of counsel which he had requested. The decision of the Supreme Court of Connecticut was in conflict with that of the First District Court for the District of Connecticut. *See* Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966).

7. 18 U.S.C. § 1 (1970), defines petty offense as any misdemeanor, the penalty for which does not exceed imprisonment for six months or a fine of not more than $500 or both. The Criminal Justice Act, 18 U.S.C. § 3006A (1970), adopted this standard for the appointment of counsel in misdemeanor cases in federal courts.

8. 236 So. 2d at 444.

9. James v. Headley, 410 F.2d 325 (5th Cir. 1969) (counsel must be provided in any state or federal criminal prosecution that could result in the "loss of liberty" of the accused).

10. 236 So. 2d at 444.

The Supreme Court reversed the decision of the state court, rejecting the premise that because crimes involving a maximum punishment of six months can be tried without a jury, they can also be tried without the assistance of counsel.[11] Instead of limiting *Powell v. Alabama*[12] and *Gideon*[13] to the particular offense, the dicta of these opinions were read as relevant to any criminal prosecution.[14] The Court found that interests adversely affected by the loss of liberty and the accused's right to an impartial proceeding outweigh any strain that would be impressed upon legal resources by an expanded system of appointed counsel.[15]

The all-encompassing nature of the sixth amendment has been slow to emerge. The common law had accepted the anomaly of providing counsel for misdemeanants while failing to offer the same protection to felons. Long ago the Supreme Court asserted, however, that the adoption of the sixth amendment was an unqualified rejection of the limitation that the common law imposed upon the right to counsel, yet there is nothing in the history or intent of the Framers to suggest that the constitutional guarantee anticipated the derogation of the right as it had existed at common law.[16] The due process implications were first discussed in *Powell*.[17] The *Powell* defendants were given neither time to secure counsel nor an opportunity to consult with their attorney who was a late appointment and who failed to function as an effective advocate.[18] Mr. Justice Sutherland framed the issue before the Court not in terms of whether the sixth amendment contemplated appointment at public expense or the right of each defendant to retain counsel for his defense, but rather in terms of the positive duties that

11. Argersinger v. Hamlin, 407 U.S. 25, 29 (1972).
12. 287 U.S. 45 (1932). In *Powell*, seven Negroes were charged with the rape of two white girls on a freight train near Scottsboro, Alabama. The defendants were brought to trial amidst an atmosphere of great public outrage that necessitated military protection.
13. 372 U.S. 335 (1963).
14. 407 U.S. at 32.
15. *Id.* at 34-37. The Court specifically mentioned the complexity of the rules of evidence, constitutional issues, ascertainment and presentation of defenses, and the increasing number of guilty pleas as being the most serious, for they involve a waiver of the right against self-incrimination, the right to a jury trial, and the right to confront witnesses. It is also apparent that the probability of these difficulties arising for the unaided layman is not related to the gravity of the charge, or the maximum punishment.
16. 287 U.S. at 61-65. The Court in *Powell*, in its presentation of the right to counsel as it existed in the colonies prior to the adoption of the Constitution, failed to differentiate between the right to employ counsel at private expense, and the right to request appointed counsel at public expense. The Court's holding encompassed both aspects. However, the Court, unlike the decision in Betts v. Brady, 316 U.S. 455 (1942), which used the latter aspect as the historic basis for the denial of assistance, failed to deal with the contention that the two situations present different due process issues.
17. 287 U.S. 45 (1932).
18. *Id.* at 49-56.

fourteenth amendment due process imposes upon the criminal justice system when an indigent appears unrepresented.[19] The Supreme Court reversed the conviction, noting that the proceeding was fundamentally unfair in two respects. The lower court had ignored the mandates of due process by neither affording the defendants an opportunity to secure counsel nor appointing counsel in light of the defendants' indigency.[20]

Since *Powell* was decided before *Palko v. Connecticut*,[21] which was the first instance in which the Court expressed support for selective incorporation, the approach was necessarily limited to the mechanism and requirements of fourteenth amendment due process.[22] *Powell* had to be structured around notions of fundamental fairness which forced the Court to weigh surrounding circumstances.[23] There was simply no existing understanding of due process by which the Court could have declared that the denial of the assistance of counsel in a capital case,[24] let alone any criminal prosecution, was a per se violation of due process. Prejudice had to be established through circumstances.[25] Yet the impetus of the *Powell* decision clearly applies to any criminal prosecution. The inability of one unskilled in the science of law to judge the validity of the indictment, the relevancy of evidence, the consequences of a plea of guilty and his incompetence to ascertain and present an available defense should eliminate any question regarding the fairness of the proceeding.[26] Although the Court in *Powell* narrowed the impact of the holding by making collateral circumstances determinative

19. *Id.* at 60.
20. *Id.* at 71.
21. 302 U.S. 319 (1937).
22. *See* Chicago, Burlington & Q.R.R. v. Chicago, 166 U.S. 226 (1897); Hurtado v. California, 110 U.S. 516 (1884). One of the principal obstacles confronting the Court in *Powell* was the understanding in *Hurtado* that if the fourteenth amendment was intended to perpetuate some of the specific guarantees of the first eight amendments, it could do so only by specific inclusion, not through the implications of due process of law. The Court concluded that there must be exceptions to this rule when the right is a fundamental principle of liberty and justice. If this is so, then the right is protected against state action because it is embraced within the fourteenth amendment due process clause. The Court confined itself to this approach of necessity for it was an infringement on the sovereignity of the states.
23. *See* Twining v. New Jersey, 211 U.S. 78 (1908).
24. *See* Hamilton v. Alabama, 368 U.S. 52 (1961). The Court finally declared that there was a flat requirement of appointed counsel in capital cases.
25. Indicative of the Court's approach when dealing with a federal controversy is Johnson v. Zerbst, 304 U.S. 458 (1938), in which the Court declared that failure to comply with the sixth amendment mandate of the assistance of counsel voids federal jurisdiction of the court regardless of the circumstances. The Court further stated than when state action is involved, an examination of circumstances to establish unfairness is the only way of being responsive to the issue presented.
26. 287 U.S. at 68-69.

of the issue of fairness,[27] at a higher level of abstraction the Court suggests that the denial of counsel is an infringement of due process at least in capital prosecutions and possibly in less serious ones.[28]

In *Betts v. Brady*,[29] the petitioner, who had been convicted of a felony, urged that the prior decisions of the Court required the appointment of counsel regardless of circumstances.[30] The Court responded that this was a misreading of *Powell* for that decision was the precursor of the "special circumstances" standard.[31] The Court looked to the totality of the circumstances and agreed with the lower court that the absence of counsel did not render the proceeding fundamentally unfair and that his presence would not have changed the outcome of the trial.[32] This rule was eventually discarded in *Gideon,* for *Gideon* ignored the conclusions of *Powell* concerning the fundamental nature of the right to counsel.[33]

For some reason the rights to counsel and to a jury trial have been measured by a different standard from that applicable to other guarantees of the sixth amendment.[34] None of the other guarantees of the sixth amendment except the rights to counsel and to a jury trial have been dependent upon the type of proceeding or the seriousness of the offense in either federal or state courts.[35] In *Argersinger,* the Court re-

27. *Id.* at 45.
28. *See* Junker, *The Right to Counsel in Misdemeanor Cases,* 43 WASH. L. REV. 685 (1968).
29. 316 U.S. 455 (1942).
30. *Id.* at 462.
31. *Id.* at 463. In its historic analysis, the Court made the distinction between the right to employ counsel at private expense and the right to request appointed counsel at public expense, which was not dealt with in *Powell,* and reached the conclusion that appointed counsel was not so fundamental as to be included in due process. The "special circumstances" standard assumed that due process required appointment of counsel only in those cases in which it appeared from an examination of the totality of the facts that the accused's trial would be fundamentally unfair without counsel's assistance.
32. *Id.* at 472-73.
33. 372 U.S. at 344. The "special circumstances" standard was eventually discarded for it entailed a retrospective approach to due process. Procedural safe-guards are instituted to insure the fairness of the proceeding prospectively. When a court approaches due process from the view that an individual can be denied rights, except in those cases in which judicial hindsight exposes unfairness, the whole rationale of the rule of law is defeated. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 163 (1955).
34. The decisions that followed the implications of *Gideon* intially extended counsel to all misdemeanants. *See* Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965). Some of the courts withdrew from this position and began to apply a standard similar to the special circumstances of *Betts* in regard to misdemeanants. Others applied the petty offense standard as annunciated in 18 U.S.C. § 3006A (1970). *See* Brinson v. Florida, 273 F. Supp. 840 (S.D. Fla. 1967). The most recent approach was taken in James v. Headley, 410 F.2d 325 (5th Cir. 1969), which suggested the utilization of the "loss of liberty" and "special circumstances" standards. *See generally* Comment, *The Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States,* 3 CREIGHTON L. REV. 103 (1970).
35. 407 U.S. at 27-28.

jected the lower court's equating of the right to counsel with the right to a jury trial.[36] The Court noted that the rights were of separate origin, the latter having a valid historic basis, the former being a rejection of the common law understanding.[37] Furthermore, they serve different purposes. The belief expressed in *Duncan v. Louisiana*,[38] was that some instrumentality had to be imposed between contending parties to prevent the abuse of official power. If the offense was serious enough, the defendant had the right to prefer the judgment of a jury of his peers who would prove more sensitive than the overzealous prosecutor or the biased judge.[39] The right to a jury trial was a recognition that official power is easily abused when entrusted in a few hands.[40] Yet the decision in *Duncan*[41] received prospective application[42] since it could not be said that a trial before a judge was fundamentally unfair in all cases.[43] However, *Gideon* was given full retroactive application,[44] which would seem to reflect the more fundamental nature of the right to counsel.

The assistance of counsel, on the other hand, was designed to achieve

36. *Id.* at 25.

37. *Id.* at 30. *See* Frankfurter & Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926). When the Constitution was adopted, the origins of the right to a jury trial could be traced to the practices that existed at common law. The denial of a jury trial at common law for petty offenses is often cited as a justification for the present limitations on the right. However, when the right to counsel was adopted, it was a rejection of the limitations as they had existed at common law, divorcing the right from its historic ties. The right to counsel was not premised on the practices of the common law. *See* Holden v. Hardy, 169 U.S. 366 (1898).

38. 391 U.S. 145 (1968). The petitioner, a Negro, noticed his cousins talking with a group of white boys. There had been racial incidents at their school and the petitioner suggested that his cousins leave with him. The white boys testified that just before leaving the petitioner slapped one of the white boys. He was charged with simple battery, a misdemeanor under Louisiana law punishable by two years imprisonment and a $300 fine. He was convicted and sentenced to serve 60 days and pay a fine of $150.

39. Williams v. Florida, 399 U.S. 78, 100 (1970).

40. 391 U.S. at 156.

41. *Id.* at 145.

42. *See* DeStenfano v. Woods, 392 U.S. 631 (1968).

43. *Id.* at 634. Whenever a new constitutional rule is adopted that significantly improves the pre-existing fact-finding prcoedures, it receives full retroactive effect whether the case is before the Court on direct, or habeas corpus review. There are traditionally three criteria that determine the retroactivity of a new constitutional rule. They are the purpose to be served by the new standard, the extent of the reliance by law enforcement officials on the old standard, and the burden on the administration of justice of the retroactive application of the new standard. The latter criteria are applicable when the effect of the new standard is not to substantially alter the reliability of the fact-finding process. *Gideon* was given full retroactive effect because it was within the scope of the former test while *Duncan* was applied prospectively since there would be no measurable improvement in the fact-finding process on retrial. There was also justifiable reliance on the lack of the applicability of the sixth amendment to the states and there would be a significant adverse effect on the administration of justice. *See* Desist v. United States, 394 U.S. 244 (1969).

44. *See* Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

a balance of power between the skills of prosecution and defense.[45] The intricate defensive weapons available in a judicial proceeding were fashioned not for the inarticulate layman but for competent counsel.[46] As the circuit court in *James v. Headley*[47] noted, when the defendant is left to his own resources, his fate depends not on his guilt or innocence but on an unequal struggle of wits. The argument that the prosecutor and judge can protect the rights of the unrepresented defendant ignores the adversary basis of our system of criminal justice.[48] When an indigent can be tried without a jury, the only available safeguard of the indigent's rights is appointed counsel.[49]

No decision of the Court, prior to *Argersinger,* more closely approaches the "loss of liberty" standard than *In re Gault.*[50] Gault was charged with an offense which would have been punishable by a fine of $50 or imprisonment for less than two months if he had not been a minor.[51] The petitioner, however, only fifteen, was adjudged a juvenile delinquent and sentenced to serve the remainder of his minority (six years) in a state institution.[52] Admittedly, a decision that a minor is delinquent usually results in his incarceration for a substantial period and so this apparent extension of the right to counsel is really no more than an application of the "felony" standard of *Gideon.*[53] Nevertheless, the Court analogized this proceeding to the criminal prosecution which would have occurred if petitioner had not been a minor.[54] The Court did not decide that counsel was essential because of the severity of the sentence but rather counsel was necessary "to cope with the problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceeding, to ascertain whether the defendant has a defense

45. 410 F.2d at 333.
46. 372 U.S. at 344. *See* Johnson v. Zerbst, 304 U.S. 458, 462-63 (1937).
47. 410 F.2d 325 (5th Cir. 1969).
48. 287 U.S. at 61.
49. *See* Baldwin v. New York, 399 U.S. 66 (1970) (New York could not try a defendant who faced imprisonment for more than six months without a jury). Since certain misdemeanors were punishable by more than six months imprisonment, the defendant faced the possibilty of presenting his case to a jury without the aid of counsel. Needless to say, this is a difficult task and denies the defendant's right to exercise in his behalf the considerations that prompted the decision in *Duncan.* Having emasculated the right to a jury trial for the indigent misdemeanant, the only solution was to appoint counsel.
50. 387 U.S. 1 (1967).
51. *Id.* at 8-9.
52. *Id.* at 7-8.
53. The Court noted that the confinement is for the period of the child's minority but since jurisdiction is limited to persons under the age of eighteen, the sentence is usually for a period in excess of three years. *See* 372 U.S. at 335.
54. 387 U.S. at 36.

and to prepare and submit it."[55] Without specifying the required length of the loss of liberty, the Court held that in any proceeding in which a juvenile's freedom may be curtailed, counsel must be appointed for the indigent youth.[56] In these two respects, that a misdemeanor prosecution is not inherently less complicated than a felony, and that the use of broad categories of offenses to determine the applicability of the right to counsel do not coincide with the scope of due process, *Gault* undermined the Court's previous method of expansion of this sixth amendment guarantee in degrees.

Since *Powell,* the Court has been approaching the "all criminal prosecutions" standard explicit in the sixth amendment.[57] In *Argersinger,* it was the conclusion of the Court that the paramount interests of the accused do not arise until he faces a loss of liberty. This standard involves a discrimination between deprivations of liberty and property with respect to a fundamental right. The "special circumstances" and "felony standards have been rejected either because the distinctions that they drew were impermissible or because they bore no relation to the interests that counsel was designed to protect. A similar situation arose in *Douglas v. California,*[58] in which the state maintained a different appellate procedure for indigents. Instead of appointing counsel to assist in these appeals, the appellate court conducted an independent review of the trial record to determine whether counsel would be helpful in prosecuting the appeal, in effect, to determine whether there was any merit in the appeal.[59] The Court found the procedure violative of the equal protection clause declaring that justice is not preserved when the rich can compel a court to listen to their arguments while the poor cannot.[60] Although the Court has never specifically referred to *Douglas* in any right to counsel decision, the equal protection rationale can be easily analogized to the right to

55. *Id.*
56. *Id.* at 41.
57. U.S. CONST. amend. VI.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
58. 372 U.S. 353 (1963).
59. *Id.*
60. *Id.* at 355.

counsel standards.[61] There is no equal justice when the kind of trial a man enjoys depends on the amount of money he has. To some extent the failure to expand the right to counsel has been a function of cost rather than the result of difficulty in defining the requirements of due process.[62] But that perspective overlooks the due process issue for it focuses attention on whether the state can afford the expense, not whether the defendant, as a layman, has sufficient skills to defend himself.[63] If the layman cannot adequately defend himself and the state justifies the denial of counsel not on due process grounds but on a fiscal basis, the resulting classification would seem to be impermissible under *Douglas.*

In *Argersinger,* the Court erects a standard, the "loss of liberty", that distinguishes between deprivations of property and liberty. In its opinion the Court looked to the requirement of fairness, the inadequacies of the layman, the complexity of the issues and the interests of the defendant that can be forfeited or jeopardized even in the context of a misdemeanor. Yet the new standard is unresponsive to at least three of the foregoing requirements. The Court implies that the interests of a defendant who suffers a loss of property are of less consequence than a defendant who suffers a loss of liberty.[64] In *Mayer v. Chicago,*[65] the respondent argued that it could discriminate in the distribution of free trial transcript between defendants who are fined and those who are imprisoned, for the fiscal interests of the state outweigh the interests of the former in burdening the appellate process.[66] The Court re-

61. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations,* 48 MINN. L. REV. 1, 7-14 (1963).

62. If one compares the rationales of *Powell, Gideon,* and *Argersinger,* little has emerged from the earliest decision that expands upon the fundamental nature of the right to counsel. The relationship between due process and the right to counsel was conclusively defined in *Powell.* Nevertheless it has taken the Court thirty years to conclude that in capital and felony cases there cannot be a fair proceeding without the assistance of counsel. Like the right to a jury trial, the right to counsel entails substantial expenditures on the segement of the population that contributes least to the public coffer. Perhaps the reminder of Justice Traynor in People v. Brown, 55 Cal. 2d 64, 357 P.2d 1072, 9 Cal. Rptr. 816 (1960), is appropriate:

> A court does not suddenly become omniscent when the appellant proves impecunious.

Id. at 70, 357 P.2d at 1077, 9 Cal. Rptr. at 821.

63. Bute v. Illinois, 333 U.S. 640, 682 (1948).

64. *See* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 78 (1970). Since indigents can no longer be imprisoned for failing to pay a fine either when the only statutory penalty is a fine or when failure imposes a punishment longer than the maximum statutory period, perhaps the Court feels that there has been achieved a balance between the rights of the defendant and the public treasuries. It is interesting to note that the Court in Mayer v. Chicago, 404 U.S. 189 (1971), rejected the notion of balancing in regard to the fundamental rights of the sixth amendment.

65. 404 U.S. 189 (1971).

66. *Id.* at 196.

plied that this differentiation misconceives the impact of *Griffin* and *Douglas* for the question is not one of balance but of prohibition against any procedure that deprives one of due process solely because of poverty.[67]

The right to counsel is the operative provision of the sixth amendment for through it the other safeguards are effectuated. Its operation also extends beyond the scope of the amendment to preserving a trial record for appeal. Yet in comparing *Argersinger* and *Mayer,* the Court says that states cannot deny an indigent misdemeanant who was only fined the mechanism for bringing an appeal, nevertheless the Court agrees that states can deny the similarly situated defendant representation by counsel, which is the means of preserving an appealable record. States can no longer establish procedures that prevent the indigent from receiving a transcript of his trial or assistance of counsel on appeal. It seems that the Court has chosen a standard that holds justice in abeyance for this class of defendants who are faced with the same legal complexities and inadequacies while providing assistance to interpret a barren record.

Eventually the Court will have to integrate the equal protection and right to counsel decisions for there is a growing friction between them. Since the Court seems reluctant to extend the right to counsel to all criminal prosecutions, the present standard will prove unresponsive to the plight of individuals who face substantial injury yet no imprisonment. Most probably discretion will have to be vested in trial judges to appoint counsel in situations not involving the loss of liberty according to a "special circumstance" rule similar to that of *Betts v. Brady.*[68]

Robert B. Evanick

67. *Id.* at 197.
68. 316 U.S. 455 (1942).